BAR BULLETIN

PUBLISHED BY THE LOS ANGELES BAR ASSOCIATION

Bar's Opportunity For Service

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Rules of Reference Service

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A. B. A. Ethics Opinion

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Law and Motion Practice

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BAR BULLETIN

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IMPORTANT NOTICE

To Members of the Bar:

This issue of *The Bar Bulletin* contains two matters that should command your attention and interest, viz.:

1. *Rules governing the Lawyers Reference Service, prefaced by the statement of the chairman of the Committee; and*
2. *Opinion of the Legal Ethics Committee of the American Bar Association on the propriety, scope and regulation of such a service.*

The opinion, we believe, goes far beyond any previous rule laid down by the American Bar Association in a similar situation with relation to the general subject of Bar advertising. For this reason, it is of the greatest importance to all members of the Bar everywhere.

Concurrently with the publication of these Rules and the A. B. A. opinion in *The Bulletin*, the Los Angeles Bar Association will mail to every member of The State Bar of California in active practice in Los Angeles County a letter explaining the Lawyers Reference Service.

This service is now open to all members of The State Bar in Los Angeles County in active practice, whether members of the Association or not.

The Service was approved and established by the Association with the sincere belief that it will, if supported by members of the Bar generally, prove to be helpful to the public as well as the legal profession.

Editor, Bulletin

BAR'S OPPORTUNITY FOR SERVICE

By Vernon Spencer, Chairman Committee on Lawyers Reference Service

In 1937 the Board of Trustees of Los Angeles Bar Association established the Experienced Lawyers Service in response to a growing recognition of the responsibility of the Bar to make available advice and council to laymen who do not know a lawyer.

Acting upon the recommendation of the Association's Committee on Experienced Lawyers Service, the Board of Trustees in June, 1940, authorized the reorganization of the reference system and at that time changed the name thereof to "Lawyers Reference Service." The reference system was at that time enlarged to render a more complete service so as to more fully meet the requirements of the public. (See the June, 1940, issue of the *Los Angeles Bar Association Bulletin* for complete details of the reorganized service.)

Since the reorganized service was put into effect as the Lawyers Reference Service, in 1940, there has been a substantial number of members of the Association who have registered and who have shown a sincere appreciation of the facilities thus afforded by the Association. At the same time there has been an increase in the number of persons who have applied to the Association for the name of a lawyer, or lawyers, to whom they might submit their problems. Up to this time the Association had not sought to publicize the Lawyers Reference Service to the public. Both the Board of Trustees and the Committee decided that it would not be wise to seek publicity regarding the service until the American Bar Association's Committee on Legal Ethics had passed upon the matter.

This has now been done, and the opinion of the Committee on Legal Ethics of the American Bar Association has been received by the Board of Trustees and, upon the recommendation of the Committee on Lawyers Reference Service, the rules covering the operation of the service have been amended in conformity with that opinion.

The Rules, as thus amended, are published in this issue of the *Bulletin*. Your attention is called to some of the principal changes in the Rules, namely:

1. To permit registration in the service by any lawyer who is a member of The State Bar of California and who is engaged in active practice in Los Angeles County;
2. To make the service available to members and non-members of the Los Angeles Bar Association alike, at a uniform fee, should a fee be charged for the maintenance of such service, or for the purpose of publicizing the availability of the service, and to advise the public as to the function of the lawyer.

The opinion of the Committee on Legal Ethics of the American Bar Association is also published in this issue of the *Bulletin*. A careful reading of this opinion should be most interesting and illuminating to members of the Bar. It constitutes a milestone in the progress of the organized Bar. It is sincerely hoped that every lawyer in Los Angeles County will take advantage of the opportunity thus afforded by registering for the service. To have a part in the functioning of the service should be a matter of professional pride. The co-operation of the lawyers of the County in this service can go far to improve the position of the Bar, and render an increasingly valuable service to the public.

Rules Governing the Lawyers Reference Service of the LOS ANGELES BAR ASSOCIATION

(1) The term "Association" is employed herein to designate the Los Angeles Bar Association; the term "Applicant" to designate each lawyer or layman who shall apply to the Association for reference to a lawyer; the term "Registrant" to designate each lawyer who has applied for registration or whose name is registered for references through the Lawyers Reference Service; and the term "Service" to designate the Lawyers Reference Service of the Los Angeles Bar Association.

(2) It shall be the purpose of the Lawyers Reference Service to serve laymen, and members of the profession as well, by placing in touch with each other:

(a) Members of the profession seeking a specialist or a lawyer experienced in a particular field of the practice;

(b) Laymen of the lower income groups seeking a lawyer who is willing to serve them for a relatively low fee within their means; and

(c) Other laymen seeking a lawyer in a particular field.

(3) Any member in good standing of The State Bar of California engaged in active practice of the Law in Los Angeles County may apply for registration under the Service by signing and filing at the office of the Association a "Registration Form" to be provided by the Association.

(4) Each registrant under the Service shall pay to the Association an annual registration fee of $3. The first annual registration

fee shall accompany each applicant's "Registration Form" for original registration under the Service. Each year thereafter, so long as he shall continue registered under the Service, each applicant shall pay, on or before the anniversary date of his original registration, the annual registration fee. The Association may, by order of a majority of the members of its Board of Trustees, refund all or any part of any registration fee; but the Association shall never, under any circumstances, be obligated to return or refund all or any part of any registration fee.

All fees received by the Association from registrants under the Service shall be placed in a separate Association fund designated as the "Lawyers Reference Service Fund." Said fund shall be used and expended for the sole purpose of maintaining, operating and publicizing the Lawyers Reference Service.

(5) There shall be maintained at the office of the Association three card indexes, as follows:

(a) One (of blue cards) to be used exclusively for references in response to inquiries from members of the profession, which shall contain the name of each lawyer who shall register as experienced in a field in which he feels qualified to advise other lawyers who lack experience in such field;

(b) A second index (of salmon cards) to be used exclusively for references in response to inquiries from those lay applicants of small means who must have a lawyer willing to serve them for a relatively small fee, which shall contain the names of those lawyers who shall register as being willing to handle relatively small matters, including those involving litigation, wherein the total fee is estimated not to exceed $25 either by reason of the nature of the matters themselves, or by reason of the inability of the clients to pay larger fees;

(c) A third index (of white cards) to be used exclusively for references in response to the inquiries of all other lay applicants, which shall contain the names of all lawyers who shall register for lay references pursuant to these rules.

Each index shall be classified according to the fields represented, as disclosed by the "Registration Form" filed by each registrant.

(6) The Association reserves the right, by order of a majority of the members of its Board of Trustees, to reject any application for registration, or to remove the name of any registrant from any index at any time. The Executive Secretary of the Association shall promptly notify by registered mail each registrant whose application for registration shall be rejected or whose name shall be removed from any index.

(7) Any registrant so desiring shall be permitted to withdraw his registration from the Service, or from any index thereof, or from any field of the practice classified therein, at any time upon five days' written notice to the Association.

(8) A roster of all registrants under the Service, listed in alphabetical order, shall be compiled and kept at the office of the Association. Opposite the name of each lawyer in such roster shall appear a list of the fields of the practice under which he is registered.

(9) Subject to Rule 6 hereof, the various cards comprising the three indexes described in Rule 5 shall be compiled from the information given on executed "Registration Forms" received at the office of the Association. Such cards shall be filed in the appropriate index under the proper field of the practice, in the same order in which the "Registration Forms" are received.

(10) No lawyer shall be registered in any index maintained by the Service under more than four fields of the practice of the law, in addition to registration as a trier of contested cases in one or more of such fields; provided, however, that nothing herein contained shall prevent any lawyer from being registered in more than one of the three reference indexes described in Rule 5.

(11) No lawyer shall be registered as experienced in a field in which he feels qualified to advise other lawyers who lack experience in such field, unless such registrant shall agree to consult with and advise members of the profession who lack experience in such field, for an agreed fee of twenty-five dollars in each matter, to cover one or more conferences not exceeding in the aggregate more than two hours of the consultant's time.

(12) No lawyer shall be registered in the index of those lawyers willing to serve laymen in a particular field, unless such registrant shall agree to render professional services for each layman referred by the Service upon the following fee basis:

(a) A maximum charge of three dollars, payable in advance, to cover a first conference consuming not more than one-half hour;

(b) A maximum charge of five dollars to cover a first conference consuming more than one-half hour but not in excess of one hour;

(c) With the understanding that the charges above specified cover conference and advice only, and do not include the preparation of letters or any legal papers;

(d) With the further understanding that all compensation for any further services will be subject to written agreement with the client;

(e) With the further understanding that in all such matters wherein compensation is contingent upon a recovery, the total fees will in no event exceed 40% of the total or gross recovery; and

(f) With the further understanding that if any dispute over fees should arise between the lawyer and any client referred by the Service, and the client so requests, such dispute will be submitted to the Arbitration Committee of the Association for final determination.

(13) No lawyer shall be registered in the index of those lawyers willing to serve persons of small means, unless such registrant shall make, in addition to the agreements provided in Rule 12 with respect to fees, the further agreement to handle matters (including those involving litigation) referred to him through the Service, wherein the total fee is estimated at the office of the Association, as a result of discussion with the lay applicant, not to exceed twenty-five dollars either by reason of the nature of the matters themselves, or by reason of the financial inability of the client to pay larger fees.

(14) Upon written or oral application by any layman to the office of the Association, the names of five registrants first in order under the field of the practice indicated by the applicant's inquiry, together with their respective office addresses and telephone numbers, shall be given to such applicant. If the names of fewer than five lawyers appear registered under the particular field indicated, then the names of all lawyers registered under that field shall be given to the applicant.

Such information shall be given only in writing and upon a form "Letter of Information" to be provided by the Association. A copy of each "Letter of Information" issued shall be kept and filed chronologically in the office of the Association.

The index cards of the registrants whose names appear on each successive "Letter of Information" shall be placed forthwith in inverse order to the rear of all other index cards under that particular field of the practice. And the names of the registrants whose cards are next in order under that field shall be furnished to the next applicant seeking similar service—it being the intention to rotate in succession the names of registrants under each field of the practice, so that no registrant's name shall appear a second time at the head of the names listed on a "Letter of Information" until after the name of every other registrant under that particular field of the practice shall have appeared first on a "Letter of Information."

(15) Upon written or oral application by any member of the profession to the office of the Association, there shall be made available to such applicant the names, office addresses and telephone numbers of all registrants under any field of the practice in which the applicant may be interested.

Such information may be given to lawyer-applicants by telephone, provided the information thus given be confirmed in writing upon a form "Letter of Information (for Lawyers only)" to be provided by the Association. In all instances where such information is furnished to lawyer-applicants by telephone, the confirmation "Letter of Information" shall be mailed to such applicant as soon as possible thereafter and in all events on the same day. A copy of each "Letter of Information (for Lawyers only)" issued shall be kept and filed chronologically in the office of the Association.

The index cards of those registered under any particular field of

the practice shall be rotated in succession so that no registrant's name shall appear a second time at the head of the names listed on a "Letter of Information (for Lawyers only)" until after the name of every other registrant under that particular field of practice shall have appeared first on a "Letter of Information (for Lawyers only)."

(16) Whenever the applicant shall execute a "Request for Reference Letter" on the form provided by the Association, then the office of the Association shall arrange an appointment with any lawyer chosen by the applicant from among those listed on the "Letter of Information," and shall deliver to such applicant a "Reference Letter" addressed to the lawyer so chosen.

The "Request for Reference Letter" shall be addressed to the Association, shall state the name of the lawyer chosen by the applicant from among those listed in the "Letter of Information," and shall request the Association to arrange an appointment with such lawyer for such applicant, and to issue a "Reference Letter" to such applicant.

Each "Reference Letter" shall state the name and address of both the applicant and the lawyer he has chosen, and shall confirm the date and hour of such appointment as shall have been previously made on behalf of the applicant.

A copy of each "Request for Reference Letter" executed by any applicant, and of each "Reference Letter" issued by the Association, shall be kept in the files of the Association.

(17) The Association reserves the right to decline to make the facilities of the Service available to any person.

(18) Each registrant shall keep a record of the name of each client referred to him through the Service, the approximate date of the reference, the general nature of the matter referred, and the total fee received, and shall report such information to the Association upon written request therefor.

(19) Each registrant shall be guided, governed and bound by the Canons of Professional Ethics of the American Bar Association.

(20) No lawyer shall in any event be registered under the Service unless and until he shall warrant that he is a member in good standing of The State Bar of California engaged in active practice of the law in Los Angeles County and shall agree, in consideration of the Association's maintenance of the reference service described in these rules, that the information contained in the "Registration Form" may be furnished to both professional and lay applicants in the operation of the Service by the Association; that his name may be classified in the Service as the Board of Trustees of the Association shall direct; that his name may be withdrawn from any or all classifications of the Service at any time, in the discretion of a majority of the members of the Board of Trustees, provided that he himself shall be permitted to withdraw his registration from any or all classifications of the Service at any time upon five (5) days' written notice to the Association; that so long as he shall continue registered under the Service he will pay to the Association each year, on or before the anniversary date of his original registration, the annual registration fee; that he will abide by all rules of the Service which may be promulgated by the Association; and that he will in no event hold or claim to hold the Association or any officer, trustee,

member or employee thereof to any liability whatever in connection with the operation of the Service or the use of the information contained in the "Registration Form."

(21) The Association reserves the right, by order of a majority of the members of its Board of Trustees, to amend or repeal any of the rules governing the Lawyers Reference Service, and to adopt other and additional rules to govern the Service.

THE OPINION OF THE AMERICAN BAR ASSOCIATION'S COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES FOLLOWS:

OPINION NO. 227

FILED JULY 12, 1941

ADVERTISING—CANON *27*—Canon *27* is applicable to advertising by organized bars. Opinions 179 and 205.

ADVERTISING—Canon *27* prohibits the solicitation of professional employment through an organized bar by or on behalf of a particular lawyer through advertising mediums.

ADVERTISING—Canon *27* does not prohibit the employment of advertising facilities by an organized bar to acquaint the lay public with the desirability of securing legal services promptly when a legal problem arises, and to apprise the public of the maintenance of a Lawyers' Reference Service embracing a plan of low-cost legal service, the plan under which it operates, and the availability of the service.

ADVERTISING—A plan or project to educate the lay public with respect to the benefits of legal services should be carried on by the organized bar with a purpose to give the laymen beneficial information, to enable lawyers as a whole to render better professional services, to prevent controversy and litigation, and to enhance the public esteem of the legal profession, and should be carried on in a manner in keeping with the dignity and traditions of the profession.

A local Bar Association in a large city maintains at its own expense a Lawyers' Reference Service. Under the plan, members of the Association fill out and file with the Association a registration form indicating the fields of practice for which the registrant has preference (not to exceed four), and whether he is willing to accept employment in the following classifications: (1) Consultation with other lawyers as a specialist or experienced lawyer in a particular field of practice; (2) serving laymen of the lower income groups seeking a lawyer in minor matters for relatively low fees within their means; and (3) serving other laymen seeking a lawyer in a particular field.

No registrant is registered in the first classification for consultation with other lawyers unless such registrant is willing to render such service for a fee of not more than $25 in each matter, provided the time consumed by the consultant is not more than two hours.

The registrant in the second and third classifications for service to laymen must agree to accept employment upon the following basis:

(a) That he will make a maximum charge of $3 for the initial conference of not more than half an hour, or $5 if the initial conference consumes more than half an hour but not more than an hour. (These charges are exclusive of charges for preparing letters or documents.)

(b) That all further understandings for compensation for service subsequent to the initial conference shall be reduced to writing.

(c) That if the fee incident to employment is dependent upon a contingency, such fee shall not exceed 40% of the gross recovery.

(d) That in the event of misunderstanding concerning fees, at the request of the client such dispute will be submitted to the Arbitration Committee of the Association for final determination.

In addition to these requirements, registrants in the second classification must agree to handle matters referred, including litigation, where the fee is estimated by the office of the Association at not to exceed $25 by reason of the nature of the matters involved or by reason of the financial inability of the client to pay larger fees.

The Service maintains separate indices for each of the three classifications.

Each applicant who makes inquiry at the office of the Association for assistance from the Lawyers' Reference Service will be interviewed by a member of the office staff for the purpose of ascertaining the field in which the applicant's problem lies and to determine whether the inquiry is one which can be designated as involving low-cost legal service. The Association will then furnish the applicant a letter giving the name, address, and telephone number of the applicant indicating the field in which the applicant's problem is involved and the names of five lawyers, together with their addresses and telephone numbers, who have registered in the field of service within which the applicant's problem falls. References will be made in rotation.

If the applicant is a member of the Bar, he shall be entitled to receive the names and addresses of all the lawyers registered for consultation in the particular field of the law within which the lawyer-applicant's matter lies.

The Association has presented the following inquiries:

(1) Does Canon 27 govern advertising by the organized bar for the benefit of all members of the profession in the community, assuming of course that the group advertising campaign is conducted by a bar association and that names of individuals are entirely omitted from all advertising?

(2) Is it a proper function of bar associations to conduct dignified educational campaigns designed to encourage the lay public to secure needed legal services?

(3) Would it be proper for the local Bar Association to tell the lay public, by means of newspaper advertising and through other commonly employed media of publicity, donated to or paid for by the Association:

(a) Why legal problems should always be taken to lawyers;

(b) That lawyers are better qualified than laymen, both by training and experience, to deal with legal problems, and thus protect valuable rights and interests of the lay public;

(c) That the cost of consulting a lawyer at the outset, immediately a legal problem arises, is comparatively negligible;

(d) That the bar in general always stands ready to render legal service to all persons for fees in keeping with their incomes; just as lawyers always render legal aid to indigent persons without any charge whatever; and

(e) That the local Bar Association maintains a lawyers' reference service designed to enable those who are not acquainted with any member of the profession to choose a lawyer willing to serve them for a fee within their means.

(4) Generally, to what extent may the local association properly go in informing the lay public of the existence of the Lawyers' Reference Service?

(5) Having in mind that registration under the Service is now limited to lawyers who are members of the Association, would the scope of permissive advertising be increased if the Association should open registration to non-members for a fee of, say, 50¢ per month, $6 per year, per person (the Association's annual dues being now $12)?

The opinion of the committee was stated by MR. PHILLIPS, Messrs. Houghton, Drinker, Brown, Miller, Brand, and Jackson concurring.

In Opinion 179 we said:

"We recognize a distinction between teaching the lay public the importance of securing legal services preventive in character and the solicitation of professional employment by or for a particular lawyer. The former tends to promote the public interest and enhance the public estimation of the profession. The latter is calculated to injure the public and degrade the profession . . .

"Advertising which is calculated to teach the layman the benefits and advantages of preventive legal services will benefit the lay public and enable the lawyer to render a more desirable and beneficial professional service . . .

"In carrying out a project to educate the lay public with respect to the benefits of preventive legal services, certain possible evils should be carefully guarded against.

"First, it should be carried on by the organized bar in order that any semblance of personal solicitation will be avoided.

"Second, that the purpose is to give the layman beneficial information, to enable lawyers as a whole to render a better professional service, to promote order in society, to prevent controversy and litigation and to enhance the public esteem of the legal profession, the judicial process and the judicial establishments, should be made plain.

"Third, it must in fact be motivated by a desire to benefit the lay public and carried out in such a way as to avoid the impression that it is actuated by selfish desire to increase professional employment; and any plan, however well intended, that on trial fails to convince the lay public that the purpose is to benefit the layman and not to promote professional employment should be promptly abandoned.

"Fourth, it should be carried on in a manner in keeping with the dignity and traditions of the profession. . . ."

In Opinion 205 we said:

"Canon 27 prohibits solicitation of legal business by circulars or advertisments or through touters, either directly or indirectly. In Opinion No. 191 we held that members of a Bar Association could not form a group willing to render legal services at equitable charges in accordance with ability to pay to members of low-income groups and advertise the fact that members of the group of lawyers would render such services at their respective offices between designated hours. We said that the plan contemplated the advertisement of the names of particular lawyers and the solicitation of a limited type of professional employment by them at reduced rates. There was absent in that case direction and supervision by the local Bar Association and the names of the members of the group of lawyers and their willingness to serve at reduced rates were to be advertised.

"We are of the opinion that the plan here presented does not fall within the inhibition of the Canon. No solicitation for a particular lawyer is involved. The dominant purpose of the plan is to provide as an obligation of the profession competent legal services to persons in low-income groups at fees within their ability to pay. The plan is to be supervised and directed by the local Bar Association. There is to be no advertisement of the names of the lawyers constituting the panel.

> The general methods and purpose of the plan only is to be advertised. Persons seeking the legal services will be directed to members of the panel by the Bar Association. Aside from the filing of the panel with the Bar Association, there is to be no advertisement of the names of the lawyers constituting the panel. If these limitations are observed, we think there is no solicitation of business by or for particular lawyers and no violation of the inhibitions of Canon 27."

With respect to question 1, it is our opinion that Canon 27 does place limitations on advertising by organized bars.

Subject to the conditions laid down in Opinions 179 and 205, we answer questions 2 and 3 in the affirmative.

With respect to question 4, we are of the opinion that this committee should not attempt to define the limits to which the local bar association may go in carrying on its advertising campaign further than we have indicated in Opinions 179 and 205.

With respect to advertising the Lawyers' Reference Service, the fifth question goes to the very heart of the plan.

We assume there will be no advertising of the plan as to consultants registered in the first classification. That has to do with a service by and to lawyers carried on by the association for its members, and may with propriety be restricted to such members.

As to classifications 2 and 3, a broader question is presented. Advertising of that service must be primarily to give beneficial information to the lay public and to enable lawyers generally to render a better professional service. While the fact that incidental benefits may flow to the members of the profession does not condemn such a plan, the primary object thereof, if it is to be advertised, must be benefit to the public and not to the members of the profession or any particular or selected group thereof. See Opinion 179.

An organized group of lawyers may not solicit professional employment for members of the group, nor any selected number thereof. Hence, we are of the opinion that the plan as to the second and third classifications should be broadened so as to permit registration by all reputable members of the Bar, duly licensed and in good standing, engaged in active practice in the community where the Association is located.

While this Service is maintained for the benefit of the public and not of the lawyer, it can not be maintained and advertised without some expense. An annual registration fee to defray the cost of maintenance and operation and appropriate advertising of the Service may properly be charged, provided it be imposed equally upon all registrants, both members and nonmembers of the Bar Association. Registrants may also be required to agree to abide by reasonable rules and regulations promulgated by the Bar Association respecting registrants and the carrying out of the plan, and the Bar Association, with propriety, may cancel their registration for a violation of such rules or regulations.

SUGGESTIONS TO ATTORNEYS FOR PRACTICE IN THE LAW AND MOTION DEPARTMENT

By Frank G. Swain, Judge of the Superior Court

IN order that this contribution may start in an orthodox manner may I give you a scope note of the unrelated subjects upon which I hope to touch. Those topics are: (1) costs, (2) the use of affidavits in support of or in opposition to motions, (3) the Statute of limitations in fraud actions, (4) pleading negligence and (5) the use of actions for declaratory relief. Again I warn you that I shall not attempt an exhaustive discussion of any of these points; I shall merely attempt to give you isolated bits of information about each which I hope will be of help in your practice.

I
COSTS

My first bit of information may come as a profound shock to many of you. The charge for serving a subpoena is 25 cents, not fifty cents. So closely has this important military secret been guarded that I seldom see a cost bill which does not claim fifty cents for that service. However, a quick reading of section 4300b of the Political Code will tend to confirm my suspicion on this point. Enough said.

No charge is allowed as costs for the notary fee for an affidavit of mailing. For that I rely not on any such weak prop as a section of a code but on the reasoning of the former Judge (Senator to you) Kenny which I have adopted.

Mailing is an optional, not a required method of serving documents. Being optional, like premiums on attachment bonds, etc., it is not proper to allow as costs the notary fee for the affidavit of mailing.

Mileage for 100 miles actually travelled by a witness in coming to court is a proper charge even though the witness was not served with a subpoena and even though he comes from without the county and from a point more than 100 miles distant, that is, from a point from which he could not be compelled by subpoena to come to court. This was decided very recently in the case of *Del Mar Canning Co. v. P. G. & E. Co.*, 44 A. C. A. 771.

Prior to 1939 the cost of the original transcript of a deposition was a proper charge but the cost of a copy was not. In 1939 section 1032a was added to the Code of Civil Procedure providing that the party against whom the deposition was taken, if allowed costs, could charge for his copy of a deposition but the party taking the deposition, if awarded costs, could not charge for his copy. This situation was remedied by the 1941 Legislature which amended section 1032a of the Code of Civil Procedure so that either party, if awarded costs, may recover the charge for a copy of a deposition unless it shall appear to the court that the taking of such deposition was unnecessary.

Section 1033 of the Code of Civil Procedure provided: "A party dissatisfied with the costs claimed may, within five (5) days after the service of a copy of the bill of costs, file a motion to have the same taxed by the court * * *". The practice from time immemorial, that is for as long as I can remember, has been to file a notice of motion to retax costs, not a motion to retax costs. Very recently an attorney contended in my department with considerable logic that this section means what it says and that a notice of motion to retax is not sufficient but that a written motion to retax must be filed within the five days allowed by law. However, I can now set your minds at rest. The Supreme Court long ago decided in *Carpy v. Dowdell*, 129 Cal. 244 that a notice of motion served within five days is sufficient to meet the requirements of that section. Therefore you may go ahead safe and secure in your time-honored, but illogical, way of complying with section 1033, and I recommend that you continue to file notices of motions to retax, not motions to retax.

II

USE OF AFFIDAVITS IN SUPPORT OF OR IN OPPOSITION TO MOTIONS

The fundamental point to bear in mind in this connection is that such affidavits are evidence and should contain only such matters as are competent evidence. This principle is violated more often than any other principle that I know of by practicing attorneys. It is an every day experience for me to read affidavits which are based upon information and belief and are therefore hearsay, affidavits which contain no probative facts but only conclusions or ultimate facts and above all affidavits which are purely arguments of attorneys on questions of law.

1 Cal. Jur. in the article on Affidavits states, p. 669, "An affidavit which does not state the probative facts necessary to be alleged, but which states conclusions of law, is a nullity, and any order based thereon is void. * * * This rule is frequently applied to affidavits made on a motion to change the place of trial of an action. Affidavits for such a motion must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial can-

not be had."; p. 672, "Affidavits to be used as evidence which are made upon information and belief are hearsay, and afford no competent evidence of the facts alleged therein" (citing *Pelegrinelli v. McCloud River Lumber Co.*, 1 Cal. App. 593); p. 673, "An affidavit which is to be used as evidence should be positive and direct. Pursuant to this principle, it is held in a number of cases that allegations in an affidavit to be used as evidence made in the alternative, render the entire affidavit ambiguous and uncertain as to what is meant, and consequently incompetent." Need I call your attention to the fact that the document which contains the arguments of counsel either on points of law or of fact is called a brief, not an affidavit. In drawing affidavits which are to be used as evidence I suggest that you always bear in mind that the affidavit should contain only statements of facts which the affiant could make from the witness stand, the only difference between that and testimony being that the facts in an affidavit may be set forth in narrative form instead of in question and answer form.

In this connection I would add that it sometimes happens that the person whose affidavit is necessary is hostile or unwilling to make the required affidavit. Section 2021 of the Code of Civil Procedure provides, subdivision 5, that the deposition of a witness may be taken and used "When the testimony is required upon a motion * * *". Another method of obtaining the evidence of such a witness is to subpoena him into court at the time of the hearing of the motion but remember this, that the Law and Motion Department is too overburdened to hear testimony; due to pressure of business it is impossible for the Judge to relax the rule against taking oral evidence in that department. However, in exceptional cases, where necessary affidavits cannot be obtained the Judge will transfer the hearing of a motion to a trial department via the Calendar Department in order that witnesses may be examined.

III

THE STATUTE OF LIMITATIONS IN FRAUD ACTIONS

It can scarcly be classed as confidential information when I tell you that C. C. P. 338, (4), provides that, "An action for relief on the ground of fraud or mistake" must be brought within three years. "The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Nor am I betraying a professional secret when I re-read to you the statement which you have read to me hundreds of times from *Lady Washington Consolidated Company v. Wood*, 113 Cal. 482, at 486:

> "The right of a plaintiff to invoke the aid of a court of equity for relief against fraud, after the expiration of three years from the time when the fraud was committed is an exception to the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. This is an element of the plaintiff's right of action, and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. 'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud', within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded.

These salutary provisions were imported into the statute of limitations from the equity practice of restraining the setting up of the statute of limitations in actions of law in cases where the defendant had committed the fraud in secret or had concealed the facts constituting the cause of action. In cases subsequent to the *Lady Washington* our courts have gone a long way in departing from the equitable principle that the running of the statute of limitations was postponed because the defendant had concealed from the plaintiff the facts constituting the cause of action. It is the law now that in fraud cases the statute of limitations does not run until "discovery" even though the defendant did not commit the fraud in secret and did not conceal the facts constituting the cause of action. The statute is tolled until discovery even though the plainiff could have learned of the facts by making inquiry. The most striking example of this modern revolution in the statute of limitations is in cases where the fraud could have been ascertained by consulting a public record. In many cases involving the corporate securities act the courts have held that even though the only fraud consisted in selling securities without a permit from the Commissioner of Corporations and that the facts as to such fraud could have been learned from the records in the office of the Commissioner, yet there was no duty on the part of the plaintiff to examine those records until he had notice of facts regarding the nonexistence of a permit which would put him on inquiry. Such a case was *MacDonald v. Reich & Lievre, Inc.*, 100 Cal. App. 736.

MacDonald v. Reich & Lievre was not a pleading case but inasmuch as it holds that no diligence is required of a plaintiff prior to the discovery of facts sufficient to put him on inquiry, it is authority for the proposition that the plaintiff does not need to plead facts which show diligence prior to his discovery of facts sufficient to put him on inquiry. It is, however, still necessary to plead the time and circumstances of the discovery of facts which put the plaintiff on inquiry; it is not enough to plead merely the time and circumstances of the knowledge of the facts constituting the complete cause of action.

The *Lady Washington* case (cited with approval in the leading case of *Consolidated Reservoir etc. Co. v. Scarborough*, 216 Cal. 698), is also authority for the proposition that "Whether there has been a 'discovery' of facts 'constituting the fraud', within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded." In the recent case of *Laraway v. First Nat. Bank of La Verne*, 39 Cal. App. (2d) 718, which was a trial case not a pleading case, I attempted unsuccessfuly to apply that rule. The plaintiff had purchased securities from the defendant bank. The relationship between the parties was a confidential one, the bank being the business adviser of the plaintiff who was a widow, but the only actionable misrepresentation was that the bonds were worth par. As a matter of fact they were at the time of the representations selling far below par. But within a few months after the sale the companies quit paying interest and a series of refinancing and reorganizations followed. Action was not brought for about seven years. I held that as a matter of law knowledge that the companies quit paying interest within a few months after the purchase of the securities and knowledge of the subsequent refinancings and reorganizations, all occurring more than three years prior to filing the action, were notice to the plaintiff of facts which put her on inquiry as to the value of the securities at the time of the sale and on that ground alone I directed the jury to bring in a verdict for the defendants. With an indiscretion, not at all unusual, the District Court of Appeal reversed me, thereby practically wiping out all pretense that a trial court may ever say that as a matter of law any set

of pleaded or proved facts are sufficient to start the running of the statute of limitations. That case in effect wiped out the tolling of the three year statute in fraud actions except as a question of fact. But don't forget to plead your facts as to discovery if your action is brought more than three years after the fraud is committed. Some judges of the trial court or the higher courts might cling to old-fashioned ideas gleaned from a reading of *Lady Washington*.

In short our courts have departed from the fundamental principle which was the reason for the rule postponing the running of the three year period in that it applied only where the fraud was committed in secret but they have also placed in the hands of the jury all questions as to whether there has been a sufficiency of facts to put a plaintiff on inquiry. I suggest that you advise your clients not to commit any frauds. The statute of limitations will no longer protect them. I am not complaining, because I do not hold any brief for defrauders; I am merely trying to explain the law as amended by our higher courts.

IV

PLEADING NEGLIGENCE

When I was fresh out of law school I was sure I knew how to state a cause of action for negligence. I frankly admit I do not know anything about it now. I am sure that many of you who have been in my court will agree with me. The subject is too vast for me, at this time, to attempt to give you any comprehensive view of it. I shall content myself with a few isolated points and with indicating what I think the modern trends are in negligence pleading.

The good old stand-by case of *Stephenson v. Southern Pacific Co.*, 102 Cal. 143, states, p. 146, "The following was the usual form, against the owner of a carriage for negligent driving: 'For that defendant so negligently drove his horse and carriage that the same struck against the carriage and horse of the defendant, whereby,' etc., followed by an allegation of damage." This case also quotes the familiar but little understood rule, "that it is sufficient to allege the negligence in general terms, specifying, however, the particular act alleged to have been negligently done." It is the latter part of this sentence which is the bone of contention.

In the much discussed case of *Lang v. Lilley & Thurston Co.*, 20 Cal. App. 264, which was a pleading case for damages for death of a workman killed by an elevator while working in an elevator shaft, the complaint alleged that the defendants Mahoney Bros. "so carelessly and negligently operated an elevator in said building, by means of an ignorant and unskilled employee, in whose selection the defendants (Mahoney Bros.) * * * did not use ordinary or any care, that one Albert Lang, then working in the shaft in which said elevator was operated by said defendants (Mahoney Bros.) on said date, received such personal injuries from said elevator thus operated by said defendants as aforesaid, that he was instantly crushed to death and killed." A general and a special demurrer to the complaint was sustained. The plaintiff appealed. The court said, p. 266, "The ruling was justifiable for the reason that there was a failure to specify the particular act or acts of negligence which proximately caused the accident. It is not sufficient to allege that the elevator was negligently operated and thereby the injury was produced. Defendants should have been informed, by appropriate alegation, in what respect the contrivance was negligently operated and it should have appeared that the recited facts had a casual connection with the death of plaintiff's intestate. We are left entirely to surmise whether the elevator was

moved too suddenly or too rapidly or too far or without warning or, in other words, what particular act was negligently performed." It is difficult to understand, in view of *Stephenson v. S. P. Co.*, why a complaint which in effect states that the defendants so negligently operated an elevator that it struck and killed the plaintiff's intestate does not state a cause of action. On the other hand in *Champagne v. Hamburger*, 169 Cal. 683, a non pleading case, the Supreme Court held that a complaint which alleged, among other things, that the plaintiff was a passenger in an elevator, that the plaintiff was injured, and that his injury was "caused alone by the negligence of the deefndant in failing to properly operate said elevator," stated a cause of action and was not subject even to a special demurrer. Even though one of these cases is a pleading case and the other a nonpleading case, they cannot in my opinion be reconciled. I believe the pleading was sufficient in each case. The reasoning in *Champagne v. Hamburger* is sound and the decision is not based on the supposition that the Supreme Court preferred champagne to hamburger, as has been suggested.

V

ACTIONS FOR DECLARATORY RELIEF

A New York court has said, *Reed v. Littleton*, 275 N. Y. 150, "The declaratory judgment has proved and no doubt is a useful procedure but its usefulness will soon end when its advocates seek to make it a panacea for all ills, real or imaginary." After sitting in your Law and Motion Department since the first of this year, I believe that there is more misconception of the use of the action for declaratory relief than of any other action. The action has certain very definite and important uses but the court has the power to refuse to entertain such actions (C. C. P. 1061) in "Any cases where its declaration or determination is not necessary or proper at the time under all the circumstances." It has been definitely settled that the court upon the hearing of a demurrer may exercise its discretion of refusing to entertain the action. *City of Alturas v. Gloster*, 16 Cal. (2d) 46. It has been my policy to refuse to entertain such an action unless it appears that something can be accomplished by it. This is in line with the statement made in *Borchard on Declaratory Judgments*, p. 57, "The court must be * * * 'satisfied that the declaration sought will be a practical help in ending the controversy.'" The statement has been made that the action for declaratory relief will not lie if the complaint shows that an action for coercive relief has matured. The correct statement of law is made in *Wollenberg v. Tonningsen*, 8 Cal. App. (2d) 722, 726, "The third point raised by the appellant is that the action for declaratory relief will not lie when there is an available remedy in an ordinary action at law or in equity. The answer is that the code does not so limit that right of action. Appellant cites *Stenzel v. Kronick*, 102 Cal. App. 507 and *Hamburger & Sons v. Kice*, 129 Cal. App. 68, in support of his argument. Neither case is in point. Both applied the provisions of section 1061 of the Code of Civil Procedure which gave the court discretion to refuse to exercise the power where it is not necessary or proper under the circumstances." In general I recommend that if you have an accrued action for coercive relief that you do not throw into that action as a catch-all a count or prayer for declaratory relief. There is no magic in declaratory relief which will cover up deficiencies in pleading another cause of action. Strangely enough the Appellate Court agreed with me on that point in *Jackson v. Lacy*, 37 Cal. App. (2d) 551, wherein it really used some two bit words, "Declaratory relief has for its purpose an eclaircissement or a liquidation of doubts with respect to uncer-

tainties or controversies which might otherwise result in subsequent litigation. In view of the opinion expressed as to the above-mentioned grounds for demurrer, the general prayer for declaratory relief in the amended complaint adds nothing to the cause of action. * * * The court did not err in sustaining the demurrers without leave to amend."

Again, declaratory relief may not be used to transform a municipal court action into a superior court action, at least the superior court will graciously decline such an action, as it did in *A. Hamburger & Sons, Inc. v. Kice,* 129 Cal. App. 68.

A great deal has been said in court decisions and textbooks about a justiciable controversy. The rule has been laid down that there must be a justiciable controversy before an action for declaratory relief will lie. The cure in this case seems to be worse than the disease because there has been no end to the controversy as to what is meant by the term justiciable controversy. Section 1060 of the C. C. P. provides among other things that "Any person * * * who desires a declaration of his rights and duties with respect to another * * * may bring an action in the superior court for a declaration of his rights and duties in the premises." Not long ago I sustained a demurrer without leave to amend to a complaint against a bonding company wherein the plaintiff sought to have it declared that he had not committed a crime of which he had been accused. The avowed purpose of the action was to quiet title to the plaintiff's character so that the defendant company would bond him. But the action would not lie because there was no duty on the part of the bonding company to bond him even if the plaintiff obtained a judgment that he had not committed the crime. The action did not seek a declaration of plaintiff's rights against the defendant or the defendant's duties toward the plaintiff. So much on the subject of how not to use the action for declaratory relief. Perhaps, if any of you are interested in making a living by the practice of law, you would like to know something about how this action should be used.

I refer to an article by Prof. Edwin Borchard of Yale Law School, published in the Brooklyn Law Review, Vol. IX, p. 1.

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ULLETIN

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Committee appointments for the forthcoming year will be made in the near future, and it is the desire of your President-elect and the Board of Trustees, whenever possible, to appoint those who desire to do committee work.

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